NO. 00-5122
NO. 00-5213

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
APPELLEE,
VERSUS
MICROSOFT CORPORATION,
APPELLANT.

STATE OF NEW YORK, EX REL., ET AL.
APPELLEES,
VERSUS
MICROSOFT CORPORATION,
APPELLANT.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

AMICUS CURIAE BRIEF
OF THE
CENTER FOR THE MORAL DEFENSE OF CAPITALISM
IN SUPPORT OF DEFENDANT MICROSOFT CORPORATION
AND IN SUPPORT OF REVERSAL OF THE JUDGMENTS BELOW

David R. Burton, Esq.
Counsel for the Amicus Curiae Center for the Moral Defense of Capitalism
333 N. Fairfax Street, Suite 302
Alexandria, VA 22314-2632
(703) 548-5868

CORPORATE DISCLOSURE

Pursuant to FRAP Rules 26.1 and 28, and Circuit Rules 26.1 and 28, the Center for the Moral Defense of Capitalism ("CMDC") hereby declares that it does not have any parent company or companies, and no public company or companies has any ownership interest of 10% or greater in it.

CMDC is incorporated under the laws of the District of Columbia and is exempt from tax under Section 501(c)(4) of the Internal Revenue Code. CMDC's mission is to make political leaders, the judiciary, and policy analysts aware of the relationship between reason, individualism, individual rights, limited government and economic prosperity. CMDC provides both empirical studies and theoretical commentaries on the impact of legal, regulatory, economic, and educational institutions upon American citizens' individual rights.

CMDC's Board of Directors are:

John E. Opfer, Ph.D. Pittsburgh, PA

Scott D. McDonald, Monterey, CA

Nicholas P. Provenzo, Spotsylvania, VA

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GLOSSARY

Throughout this brief the abbreviation "CMDC" means the Center for the Moral Defense of Capitalism.

IDENTITY AND INTEREST OF AMICUS CURIAE;

SOURCE OF AUTHORITY TO FILE BRIEF

The Center for the Moral Defense of Capitalism ("CMDC") is a District of Columbia non-profit corporation whose mission is to make policy-makers, the judiciary, and policy analysts aware of the relationship between reason, individualism, individual rights, limited government and economic prosperity. CMDC provides both empirical studies and theoretical commentaries on the impact of legal, regulatory, economic, and educational institutions upon American citizens' individual rights.

The source of the authority to file this amicus curiae brief is an order of this court dated November 3, 2000. In that order, the court granted leave for a joint brief to be filed by the Association for Objective Law and the Center for the Moral Defense of Capitalism. The brief developed by the Association for Objective Law did not accurately present the arguments and point of view that the Center for the Moral Defense of Capitalism had wished to present for the Court's consideration. Nevertheless, the Association for Objective Law elected to proceed without the CMDC and without its consent. Therefore, CMDC has filed a motion (together with this brief) for leave to file its brief separate and apart from the Association for Objective Law.

INTRODUCTION

A fundamental requirement of man's life in society is freedom from the initiation of force by other men. This is the central fact identified by the concept of an "individual right": man can only live and succeed insofar as he is free to use his mind and advance his life in accordance with his own rational judgment. Thomas Jefferson understood this when he declared "eternal hostility against all forms of tyranny over the mind of man." The Founding Fathers understood this when they broke free from the arbitrary coercion of King George III and created a nation dedicated to protecting the right of every man to his life, liberty, and property. Thus, the United States of America became the first country in history explicitly founded upon a moral principle—the moral principle of individual rights.

This principle supplies the standard by which America can "burn pure" its legal system, paraphrasing the well-known metaphor describing how the natural-rights philosophy of Grotius, Pufendorf, and Locke influenced the common law. Because the purpose of government is to protect individual rights, any law can be assessed objectively by determining whether it protects rights or violates them. Since rights can be violated only by the initiation of force, a proper legal system limits government's use of force to retaliation against criminals, foreign invaders, and any others who initiate the use of force. But if a government is not restricted solely to protecting rights, it may misuse its monopoly on the legal use of force to coerce its own citizens, and thereby become a much more dangerous threat than any criminal. The only means of restricting government to its legitimate functions is objective law.

The central features of "objective law" are thus twofold. First, the laws must be objectively defined, so that citizens know ex ante which actions are proscribed by the government. Second, the laws must be derived objectively from the principle of individual rights,

so as to permit only retaliation against those who have initiated force, or its indirect variant, fraud, against innocent citizens. In other words, laws must be clear, concise, and understandable to the citizens who live under them, and the laws must also be directed only at persons who initiate force against others. Without the first condition, men are unable to live without knowing when, how, or why they have violated a law; citizens live, in essence, according to government fiat. Without the second condition, the law escapes the objective boundaries that should cabin in the government's use of force; government bureaucrats are left free to coerce citizens at whim.[1]

It is CMDC's position that the antitrust laws—broadly speaking, the Sherman Antitrust Act of 1890, the Clayton Act of 1914, the Federal Trade Commission Act of 1914, the Robinson-Patman Act of 1936, and the Hart-Scott-Rodino Act of 1976—violate these two central tenets of objective law. The antitrust laws bring the coercive force of the government to bear against businessmen on the grounds that they have "restrained trade," "monopolized" business in a so-called "relevant market," or have engaged in "price discrimination," to name but a few of the business activities criminalized by such statutes. However, the relevant statutes have not defined these terms objectively, and the courts have engaged in an ad hoc construction of the statutory language.[2] Moreover, the judicial development of the standard of "consumer harm" is no more determinate than the abstruse statutory language that this standard is meant to elucidate.[3] The

[1] See generally Harry Binswanger, Objectivist Philosophy of Law, in The Philosophy of Law: An Encyclopedia 609 (Christopher B. Gray, ed., 1999).

[2] Compare U.S. v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897) (rejecting a reasonableness standard for determining whether a contract restrains trade and thus applying a literal interpretation of the Sherman Antitrust Act) with U.S. v. Joint-Traffic Ass'n, 171 U.S. 505 (1898) (creating a reasonableness standard for applying the Act, based on the absurdity of a literal interpretation, given that all contracts restrain trade in some manner).

[3] See Trans-Missouri Freight Ass'n, 166 U.S. at 324 ("In this light it is not material that the price of an article may be lowered. It is in the power of the [monopolist] to raise it.") and
(Footnote continued on next page)

result is that no successful businessman can know whether or not he is exposing himself to prosecution under the antitrust laws; the vague language of the statutes and the contradictory case law leaves average citizens without any guidance.

More important, the CMDC argues that antitrust laws invert the proper role of government, authorizing bureaucrats and lawyers to initiate force against businessmen who have not themselves engaged in force or fraud. The essential activity of a businessman, as opposed to a Mafioso or mugger, is to engage in free and voluntary trade with his customers and fellow businessmen. A businessman offers an uncoerced choice: trade with me, or do not trade with me. Businessmen produce, contract, and sell products on the market, i.e., they offer value for value in a free exchange. If a buyer dislikes a product, he is free to go to a competitor, start a new firm as an entrepreneur, or even build a better mousetrap and attract the other producer's customers through innovative product developments. Businessmen, in sum, offer value to their customers, and everyone is free to go elsewhere if they prefer. All acts are consensual. Nothing is stolen. No one is harmed. No rights are violated.

A mugger, by contrast, gains his values at the victim's expense. The mugger offers no value—he takes without giving. If the victim does not submit to the mugger's demands, he suffers injury or dies. If the victim capitulates to the mugger's demands, he loses something of value, whether it is his money or chattels. Either way, the victim loses something to the criminal, and physical coercion is the means by which the victim's rights are violated. Unlike the businessman, the criminal forces his victim to relinquish something of value that the victim

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Olympia Equip. Leasing Co. v. W. Union Tel. Co., 797 F.2d 370, 377 (7th Cir. 1986) (citing Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)) (a successful firm has a "duty under antitrust law to help a competitor").

already possesses. The victim's valuables are taken or destroyed without his consent. His valuables are stolen. The victim is harmed. His rights are violated.

The antitrust laws conflate the businessman with the criminal, and thus obfuscate the central distinction between (1) a person who offers his own valuable in a voluntary trade and (2) a person who offers no value while threatening to take or destroy another's valuables by force. The businessman does not violate anyone's rights when he contracts and sells on the free market. Thus, the predicate for the government's legitimate use of force (or fraud) — an initiation of force against an innocent citizen—is absent in the antitrust context. Instead, antitrust laws require the government to initiate force against its own innocent citizens. This vicious injustice is the logical, inevitable result of enforcing the non-objective antitrust laws.

The antitrust case against Microsoft is a paradigmatic example of both the non-objectivity and the injustice of America's antitrust laws. Microsoft is a hugely successful firm that has revolutionized the computer industry. Precisely because it has achieved such success, Microsoft was targeted for antitrust prosecution. The unjust result reached by the District Court was dictated by the non-objective nature of the statutes being applied. For the reasons that follow, CMDC believes that the Court should use this opportunity to strike down the antitrust laws as an unconstitutional deprivation of liberty and property under the Due Process Clause Fifth Amendment to the United States constitution.

ARGUMENT

The ostensible purpose of the antitrust laws is to prevent the exercise of "monopoly power," which has been defined by the United States Supreme Court as "the power to control prices or exclude competition." U.S. v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 391 (1956). See also Eastman Kodak Co. v. Image Technical Serv., Inc., 504 U.S. 451, 464 (1992)

(quoting Fortner Enter., Inc. v. U.S. Steel Corp., 394 U.S. 495, 504 (1969)) (defining monopoly power also as "the ability of a single seller to raise price and restrict output.").

Contrary to the contemporary understanding of "monopoly power," however, the common-law courts recognized that such power could be derived from only one source: a government grant. For instance, the famous Case of Monopolies, Darcy v. Allen, arose out of Queen Elizabeth's 1598 grant of a letter patent that provided for the complete monopolization of the playing card industry in England. See 77 Eng. Rep. 1260, 11 Co. Rep. 84 (K.B. 1603). Another distinguished monopoly case in 1648 implicated the crown's grant to the East Indies Company of a complete monopoly over trade routes. See East India Co. v. Sandys, 10 St. Tr. 371 (1648). Lord Coke's well-known censure of monopolies as "odious," 3 Inst. 181, rang true only for firms that received from "the King by his grant, commission, or otherwise, . . . the sole [power of] buying, selling, making, working, or using of anything, whereby any [other] person . . . [is] restrained of any freedom or liberty that they had before, or hindered in their lawful trade." Id.

These early jurists recognized that the term "monopoly" applies only to companies supported and protected by the coercive power of the government. In the modern era, however, the term no longer identifies a company capable of coercing its competitors through government action. According to Senator Sherman, a private firm that acquired a substantial portion of the market through its business acumen possessed a "kingly prerogative," and a country that refused to "submit to an emperor . . . should not submit to an autocrat of trade." 21 Cong. Rec. 2,456 (1890).

The enactment of the Sherman Antitrust Act was thus predicated upon an equivocation between the economic power of the businessman and the political power of the government. The

distinction between economic power and political power is easily summarized as the distinction between the dollar and the gun.[4] In an unregulated market, a businessman can only offer a value in a free exchange for another person's value, e.g., a product in exchange for money, services, or other products. In a free market in which everyone's rights to life, liberty, and property are fully protected, the free trade of values makes it impossible for a businessman arbitrarily to set prices or exclude potential competitors.[5] The businessman who respects the rights to life, liberty and property can only offer values—he cannot coerce.

A government, on the other hand, can only coerce—it can act only by exercising the means available to it, namely, the force that its citizens have entrusted to it for use in protecting their rights. A government does not offer value for value; with its monopoly on the legal use of force in society, a government threatens, fines, imprisons, and even kills those who do not act according to its laws. These two diametrically opposite methods of human interaction—free trade versus coercion—were improperly united in Senator Sherman's justification for his Antitrust Act.

Lord Coke understood why a "monopoly" was "odious." The firm that used the coercive power of the English crown to stifle its competition was, strictly speaking, violating the "freedom or liberty" of the hapless businessmen who suffered under the Crown's compulsion.[6]

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[4] For further elaboration of the distinction between "the power of money and the power of guns," see Ayn Rand, America's Persecuted Minority: Big Business, in Capitalism: The Unknown Ideal 44, 46-47 (1967).

[5] See Alan Greenspan, Antitrust, in Capitalism: The Unknown Ideal 63, 68 (1967) ("Without government assistance, it is impossible for a would-be monopolist to set and maintain his prices and production policies independent of the rest of the economy. For if he attempted to set his prices and production at a level that would yield profits to new entrants significantly above those available in other fields, competitors would be sure to invade his industry.").

[6] Following Edward Darcy's complaint to the Privy Council in 1600 that various English subjects were violating his letter patent for a playing card monopoly, for example, the Council

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This violation of an Englishman's right to engage in "lawful trade" was certainly "odious," i.e., a moral perversion. In conflating the coercive power of government with the peaceful, free relations between businessmen, the Sherman Antitrust Act turned Lord Coke's moral indignation on its head. According to Sherman, the man who succeeds in business and thus gains the economic power to offer better values to his partners and customers is acting in the same manner as a government bureaucrat who threatens to imprison a man unless he ceases competing with the U.S. Post Office.

The Sherman Antitrust Act is thus a house that lacks a foundation, reflecting neither the common-law definition of "monopoly" nor the Founding Fathers' conception of individual rights that animates the Declaration of Independence and the U.S Constitution.[7] The Sherman Antitrust Act was without precedent—either legally or morally.

1. The Antitrust Laws Are Non-Objective Because They Fail To Provide Businessmen with Clear and Concise Guidance Necessary To Avoid Sanctions Under the Law.

Reflecting its inherent antagonism to the actual nature of businessmen's actions and to the principle of individual rights, the Sherman Antitrust Act speaks in sweeping terms that broadly condemn all commercial business practices. The Act declares that "[e]very contract,

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proclaimed that "diverse, obstinate and undutiful [sic] persons, as in contempt of . . . her Majesty's prerogative, have of late willfully and publicly impugned it, ... shall be taken and committed to prison . . . ." 31 Acts of the Privy Council, 1600-1601, at 55-6 (December 23, 1600) (John R. Dasent ed., 1974).

[7] CMDC recognizes the rule at common law that all contracts that "unreasonably restrained trade" are void, Mitchell v. Reynolds, 24 Eng. Rep. 347, 1 P. Wins. 181 (K.B. 1711). Such a rule is nonetheless distinguishable from the common-law cases dealing with "monopolies." For instance, the opinion in Mitchell never uses the term "monopoly." Moreover, rescinding a contract on the grounds that it "is a bare restraint of trade and no more," id., is a far cry from the pecuniary and penal sanctions contained in the American antitrust laws. See Standard Oil Co. of N.J. v. U.S., 221 U.S. 1, 50 (1911), and U.S. v. Addyston Pipe & Steel Co., (Footnote continued on next page)

combination in the form of trust or otherwise . . . in restraint of trade or commerce . . . is declared to be illegal," 15 U.S.C. § 1 (2000), and that "[e]very person who shall monopolize, or attempt to monopolize . . . any trade or commerce . . . shall be deemed guilty of a felony." 15 U.S.C. § 2. The Sherman Antitrust Act's successor statutes also reflect the same type of sweeping language, see, e.g., Clayton Act, 15 U.S.C. § 14 (2000) ("it shall be unlawful for any person . . . to lease or make a sale or contract . . . [that] may . . . substantially lessen competition or tend to create a monopoly in any line of commerce.").

A statute that condemns all business practices in broad, abstract language cannot meet the essential test of objective law, which requires statutes to be enacted in clear, meaningful language that provides objective guidance to citizens living under these statutes. On their face, the antitrust laws violate every businessman's right to use and dispose of his property. The "economic power" that the antitrust laws sanction is simply the free exercise of a businessman's property rights. The businessman who uses neither the coercion of the government nor of the criminal cannot find guidance for his behavior in the broadly condemnatory words of the antitrust laws. Thus, in accordance with the moral principle that gave birth to the United States of America, a businessman's right to create, use and dispose of his property deserves the protection of U.S. laws, not its condemnation.

Furthermore, the language of the antitrust laws is unavoidably vague and, most important, undefined within the statutes themselves. All contracts "restrain trade" in some manner. A successful commercial firm seeks to gain as much market share as possible, and thus the essence of successful business practices is an "intent to monopolize." Many business

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85 F. 271, 279 (6th Cir. 1898) (Taft, J.). As such, the Sherman Antitrust Act is a novel statute based upon a modern (Marxist) notion that conflates government power and economic power.

agreements "substantially lessen competition," and, most important, all successful business agreements have the effect of "substantially lessening competition."

The courts are thus left with the unavoidable necessity of having to distinguish between allegedly "proper" business activities and those commercial enterprises that "monopolize" a market or "restrain trade." The Supreme Court has acknowledged the need to draw this distinction: "In the absence of any purpose to create or maintain a monopoly, the [Sherman Antitrust Act] does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." Lorain Journal Co. v. U.S., 342 U.S. 143, 155 (1951) (quoting U.S. v. Colgate & Co., 250 U.S. 300, 307 (1919) (emphasis added)). Given that the language of the statute does not provide any guidelines for drawing this distinction, however, the courts are left with extensive discretion to rewrite the antitrust statutes themselves. See Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 20 (1978) ("Antitrust is, first and most obviously, law, and law made primarily by judges.").[8]

This discretion has lead to contradictory case law on every subject within the ambit of the antitrust laws. With respect to price-fixing agreements, for instance, the Supreme Court has at times adopted a reasonableness standard. Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1968) (finding an efficiency justification for BMI's blanket licensing arrangement); Appalachian Coals, Inc. v. U.S., 288 U.S. 344, 374 (1933) (recognizing an explicit

[8] For additional, and often conflicting, judicial statements on the goal of the antitrust laws, and the standards for adjudicating these statutes, see National Soc. of Professional Engineers v. U.S., 435 U.S. 679, 688 (1978); Brown Shoe Co. v. U.S., 370 U.S. 294, 344 (1962); Northern Pacific Ry. Co. v. U.S., 356 U.S. 1, 4-5 (1958); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273 (2d Cir. 1979), cert. denied 444 U.S. 1093 (1980); U.S. v. Aluminum Co. of America, 148 F.2d 416, 427 (2d Cir. 1945).

price-fixing arrangement as reasonable given its purpose to "foster fair competitive opportunities"); Chicago Bd. of Trade v. U.S., 246 U.S. 231, 239 (1918) (recognizing that call rules that restrict competition and control prices are a "reasonable regulation of business"). However, the federal courts have also adopted a per se rule of illegality in other cases. U.S. v. Socony-Vacuum Oil Co., Inc., 310 U.S. 150 (1940) (holding that price-fixing agreements among competitors are per se illegal); National Macaroni Mfg. Ass'n v. FTC, 345 F.2d 421 (7th Cir. 1965) (holding that price-fixing agreements among buyers are per se illegal). Private businessmen are thus left with no clear guidance under the antitrust laws as to whether their commercial agreements will be criminally sanctioned as illegal horizontal restraints.

The same point may be made with respect to tying arrangements, another business activity deemed to be "improper" under the antitrust laws.[9] The Supreme Court has maintained that a finding of illegal tying of two products requires that the firm hold "appreciable economic power," Eastman Kodak Co., 504 U.S. at 462. Furthermore, a finding of tying requires that the alleged tying practice has "foreclose[d] competitors from any substantial market." International Salt Co. v. U.S., 332 U.S. 392, 396 (1947). Both of these conditions are explicitly predicated upon the improper equivalence of economic and political power. A businessman cannot coerce a customer or business partner to accept his products, regardless of whether they are integrated or not.

Moreover, these overly broad and vague factors for determining whether an integrated product represents an illegal "tying arrangement" produce excessive discretion in the courts,

[9] "A tying arrangement is 'an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.'" Eastman Kodak Co. v. Image Technical
(Footnote continued on next page)

which logically leads to contradictory case holdings. Compare Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984) (applying a pseudo-reasonableness standard in holding that appellant lacked the requisite "market power" for its tying practice to be illegal) with Northern Pacific Ry. v. U.S., 356 U.S. 1, 6 (1958) (holding that tying arrangements are "unreasonable in and of themselves" regardless of whether defendant possesses any "economic power"). See also U.S. v. Microsoft Corp., 147 F.3d 935, 951 (1998) (holding no illegal tying arrangement, given the additional economic factors that "integration brings benefits" and that Microsoft had a valid business reason for combining its products). The lack of clear statutory standards to provide objective guidance to the courts results in continually protean applications of the antitrust laws.[10] Businessmen are thus the unfortunate victims of a legal doctrine that provides them no objective limits for determining how to act so as to avoid criminal liability.

Additional reviews of the case law in other antitrust doctrines, such as conscious parallelism, would produce similar results. The ad hoc development of antitrust law by the judiciary, and the ex post rationalization of this legal doctrine by the law and economics movement, see Herbert Hovencamp, Antitrust Policy After Chicago, 84 Mich. L. Rev. 213 (1985), have produced a chaotic and often contradictory mountain of shifting legal precedents.[11]

Serv., Inc., 504 U.S. 451, 461-62 (1992) (quoting Northern Pacific Ry. Co. v. U.S., 356 U.S. 1, 5-6 (1958)).

[10] Compare Justice Peckham's declaration that the purpose of the antitrust laws is to insulate the "small dealers in the commodity" from competition by larger firms, Trans-Missouri Freight Ass'n, 166 U.S. at 324, with the government's sanction of a small grocery store association, whose individual members possessed no more than 6% of the relevant market in their respective areas, for illegal market division, U.S. v. Topco Associates, Inc.,405 U.S. 596 (1972).

[11] But see The Federalist No. 78, at 471 (Clinton Rossiter ed., 1961) (Alexander Hamilton) (insisting that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound by strict rules and precedents which serve to define and point out their duty in every particular case that comes before them"). See also John Locke, The Second Treatise on

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In such circumstances, it is impossible for a successful businessman to determine objectively whether his actions will be punished or not. In sum, the antitrust laws fail the first prong of the definition of objective law, i.e., laws objectively formulated such that they provide clear, concise and understandable guidance to the citizens living under them.

2. The Antitrust Laws Are Non-Objective Because They Require the Government To Initiate Force Against Innocent Citizens.

In adjudicating the antitrust laws, courts have enunciated the standard of "consumer harm" as the basis for distinguishing between illegal versus legal business activity. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 606-08 (1985) (holding that the evidence indicated that "consumers were adversely affected" and that defendant failed "to offer any efficiency justification whatever for its pattern of conduct"); Data General Corp. v. Grumman Systems Support Co., 36 F.3d 1147, 1183 (1st Cir. 1994) ("In general, a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare."); U.S. v. Microsoft Corp., 84 F. Supp.2d 9, 137 (D.D.C. 1999) (alleging "collateral harm on consumers"). In applying this standard, and its corollary of "protecting competition," the antitrust laws superficially appear to be aimed at the protection of citizens' economic interests. However, as CMDC has indicated above, if a businessman does not engage in force or fraud, then he cannot, and will not, infringe the rights of his fellow men. Thus, when the courts have sanctioned businessmen under the auspices of the antitrust laws, they have in fact brought to bear the coercion of the government against innocent individuals.

Civil Government, § 131, at 72 (1986) (1690) (maintaining that "whoever has the legislative or supreme power of any commonwealth, is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees, by indifferent and upright judges, who are to decide controversies by those laws.").

The evidence for this proposition within antitrust case law is manifest. Judge Learned Hand's opinion in U.S. v. Aluminum Co. of America (ALCOA), 148 F.2d 416 (2d Cir. 1945), for instance, exposed the true meaning of holding businesses accountable to these standards. Judge Hand acknowledged that the "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins." Id. at 431. However, Judge Hand concluded that ALCOA was guilty of "monopolization," violating § 2 of the Sherman Antitrust Act, because ALCOA "effectively anticipated and forestalled all competition." Id.

How did ALCOA do this? ALCOA did not coerce its competitors. The record was devoid of any allegations that ALCOA engaged in any act of violence or fraud. To the contrary, ALCOA was an exemplar of successful business management, as Judge Hand recognized:

> Nothing compelled [ALCOA] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections, and the elite of personnel.

Id. For these reasons—for its long-term business model, its capital investment, its ability to attract the best employees—ALCOA was found guilty of violating the antitrust laws. Judge Hand, strictly applying the logic of the antitrust laws, acknowledged the virtues of a successful businessman—and then "turned upon [him] when he [won]." In so doing, the Second Circuit did not protect the property rights of ALCOA, it violated them.

The significance of the ALCOA decision lies in its explicit recognition of the inherent contradiction within the antitrust laws. In subordinating a businessman's use of his property rights to the inherently indeterminate notions of "consumer harm" or "protecting competition," the antitrust laws logically result in the violation of individual rights. When laws are severed

from the objective requirements of determinate language and the protection of individual rights, the force of the government will be used arbitrarily and without moral justification.[12]

The reason is that individual rights provide an objective baseline for determining their violation: the initiation of physical force, either direct or indirect. When laws are predicated upon this principle, then the government serves in its proper role as the defender of its citizens' rights. In other words, the triggering mechanism for the government's use of coercion is the determination that someone else has first used force to violate another man's rights. However, when a standard other than individual rights is used to guide the government's use of force, the result can only be the use of coercion against innocent individuals. The government subverts its own role as defender of its citizens' rights, and thus becomes, like a common criminal, a source of coercion in society.[13]

In the view of CMDC, the Department of Justice's successful prosecution of Microsoft represents the latest, and arguably the most egregious, injustice perpetrated by the government under the auspices of the antitrust laws.

The alleged "consumer harm" identified by the District Court does not so much as rise to the level of an "injury in fact," which is the principal indicia of an actual violation of one's rights. The District Court asserted that Microsoft's business practices allegedly "harmed

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[12] See, e.g., U.S. v. Aluminum Co. of America, 148 F.2d 416, 424 (1945) (Judge Hand asserted the 90-60-30 percentage of market share standard as the basis for determining the existence of a monopoly, but provided no explanation for why these percentages are legally determinative or evidence a colorable argument for or against a monopoly).

[13] In speaking of an invasion by an aggressor government, Locke maintained that this initiation of force is an unjust violation of individual rights because "[t]he injury and the crime is equal, whether committed by the wearer of a crown or some petty villain." John Locke, supra, § 176, at 97. He concluded earlier in the Second Treatise that "it is a mistake to think that the supreme or legislative power of any commonwealth can do what it will, and dispose of the estates of the subject arbitrarily, or take any part of them at pleasure." Id., § 138, at 78.

consumers in ways that are immediate and easily discernible." Microsoft, 84 F. Supp.2d at 327. However, when it came to identifying the "easily discernible" facts of Microsoft's harm to consumers, the most the District Court could identify was that: (i) there was "confusion and frustration for consumers," id. at 328, (ii) end users had "to carry software . . . providing them with no benefits," id. at 137, (iii) corporations were "denied a simple and effective means of preventing employees from attempting to browse the Web," id., (iv) OEMs provided customers with "a PC system that ran slower and provided less available memory than if the newest version of Windows came without browsing software," id. at 328, and (v) additional software led to "performance degradation, increased risk of incompatibilities, and the introduction of bugs," id. at 137. In other words, the court essentially concluded that the frustration of a new computer user should be used as the basis for forcibly breaking up one of the most successful companies in history—or the fact that people have been provided with free software they may not use should be used as the basis for prohibiting a firm from continuing to provide such benefits to its customers. Nowhere in the District Court's findings of fact is there a single identification that Microsoft did anything other than provide values to customers—who were free to use, or not use, those values and who might, or might not, have understood how to benefit from those values.

The District Court did not find any violation of another person's right to life, liberty or property. There was no finding of coercion initiated by Microsoft. As with ALCOA, the District Court sanctioned Microsoft for its successes—for developing innovative technology and engaging in entrepreneurial commercial activities.

The District Court's arbitrary discretion under the antitrust laws to unjustly coerce Microsoft in violation of its rights was best indicated by the District Court's own admission that Microsoft has not acted as if it were a "monopolist." The District Court writes:

> It is not possible with the available data to determine with any level of confidence whether the price that a profit-maximizing firm with monopoly power would charge for Windows 98 comports with the price that Microsoft actually charges. Even if it could be determined that Microsoft charges less than the profit-maximizing monopoly price, though, that would not be probative of a lack of monopoly power, for Microsoft could be charging what seems like a low short-term price in order to maximize its profits in the future for reasons unrelated to underselling any incipient competitors.

Id. at 54 (emphasis added). Thus, the District Court acknowledged that it is not possible to tell whether Microsoft is in fact a "monopolist," i.e., whether it is charging exorbitant prices that allegedly "harm" consumers.

Yet the District Court dismissed this lack of evidence as irrelevant to its determination as to whether to sanction Microsoft as a "monopolist." In other words, Microsoft is a monopolist if it charges prices that are deemed "too high"—but it is also a monopolist if it charges prices that are "too low." By virtue of its dominant position in the industry—that is, by virtue of its successful business practices—Microsoft is guilty if it does and guilty if it does not. This is not a judgment that respects the rights of American citizens and prohibits the initiation of force; on the contrary, the District Court's judgment constitutes an initiation of force against Microsoft, an innocent corporate citizen freely acting within the bounds of its rights.

Finally, the District Court's conclusion of its finding of fact revealed the inherent contradiction between the enforcement of the antitrust laws and the recognition of every individual's right to life, liberty and property. The District Court concluded: "The ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." Id. at 331 (emphasis added). However, the historical development of the concept of individual rights was to prevent the punishment of individuals for their own morality. In 1625, Hugo Grotius, the father of the modern concept of

rights, wrote: "it is not contrary to the nature of society to look out for oneself and advance one's own interests, provided the rights of others are not infringed."[14]

Whether Microsoft acted selfishly or not is irrelevant for a court of law. The court's determination properly should be restricted to whether an individual has initiated force and thus violated another man's rights. The fact that the District Court regarded the moral status of Microsoft's actions to be relevant in its findings under the antitrust laws is prima facie evidence of the injustice of the antitrust laws. The Sherman Antitrust Act and its related statutes require the government to look beyond whether a defendant has respected the rights of its fellow citizens, and as such, it authorizes the government to initiate force itself. The antitrust laws are thus palpably unjust, and respect for individual rights leads to the conclusion that the District Court's judgment against Microsoft be reversed and the antitrust laws ruled an unconstitutional deprivation of liberty and property under the Due Process Clause Fifth Amendment to the United States constitution..[15]

CONCLUSION

Therefore, for all of the foregoing reasons, CMDC respectfully requests that this Honorable Court reverse the ruling of the United States District Court for the District of

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[14] Huge Grotius, The Law of War and Peace (trans. F.W. Kelsey, 1964) (1625), quoted in Stephen Buckle, Natural Law and the Theory of Property: Grotius to Hume 31 (1991). Ayn Rand agrees with Grotius, but extends his observation by explaining that the concept of individual rights is logically predicated upon the ethics of rational egoism. See generally Ayn Rand, What is Capitalism?, in Capitalism: The Unknown Ideal 11, 17-21 (1967); Ayn Rand, Man's Rights, in id. 320-28; Leonard Peikoff, Objectivism: The Philosophy of Ayn Rand 350-412 (1993).

[15] See Federalist No. 78, supra, at 470 ("[Court cases] sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here

(Footnote continued on next page)

Columbia, and hold the antitrust laws as non-objective laws that, accordingly, are invalid and unconstitutional.

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Respectfully Submitted,

The Center for the Moral Defense of Capitalism

By its counsel:

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David R. Burton, Esq.
333 N. Fairfax St., Suite 302
Alexandria, VA 22314
703-548-5868

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also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.").

CERTIFICATE OF SERVICE

I, David R. Burton, Esq., hereby certify that on this 27th day of November 2000, I caused a true and correct copy of the foregoing amicus curiae brief of the Center for the Moral Defense of Capitalism to be served upon the following:

Phillip R. Malone, Esq.
Antitrust Division
U.S. Department of Justice
325 Seventh Street, N.W., Suite 615
Washington, D.C. 20530
Fax: (415) 436-6687
Tel: (415) 436-6660
(By Federal Express)

Richard L. Schwartz, Esq.
Deputy Chief, Antitrust Bureau
New York State Attorney General's Office
120 Broadway, Suite 2601
New York, New York 10271
Fax: (212) 416-6015
Tel: (212) 416-8000
(By Federal Express)

Kevin J. O'Connor, Esq.
Office of the Attorney General of Wisconsin
P.O. Box 7857
123 West Washington Avenue
Madison, Wisconsin 53703-7957
Fax: (608) 267-2223
Tel: (608) 266-1221
(By Federal Express)

Christine Rosso, Esq.
Chief, Antitrust Bureau
Illinois Attorney General's Office
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
Fax: (312) 814-2549
Tel: (312) 814-2503
(By Federal Express)

Catherine G. O'Sullivan, Esq.
Chief, Appellate Section
U.S. Department of Justice
Antitrust Division
601 D Street, N.W., Room 10536
Washington, D.C. 20530
Fax: (202) 514-0536
Tel: (202) 514-2413
(By Federal Express)

Bradley P. Smith, Esq.
Sullivan & Cromwell
1701 Pennsylvania Avenue, N.W., 8th Floor
Washington, D.C. 20006
Fax: (202) 293-6330
Tel: (202) 956-7545
(By Federal Express)

John L. Warden, Esq.
Richard C. Pepperman, II, Esq.
Sullivan & Cromwell
125 Broad Street
New York, New York 10004
Fax: (212) 558-3588
Tel: (212) 558-4000
(By Federal Express)

Donald M. Falk, Esq.
Mayer, Brown & Platt
1909 K Street, N.W.
Washington, D.C. 20001
Fax: (202) 263-3300
Tel: (202) 263-3000
(By Federal Express)

Mr. Edward J. Black
Mr. Jason M. Mahler
Computer & Communications Industry Association
666 Eleventh Street, N.W.
Washington, D.C. 20001
Fax: (202) 783-0534
Tel: (202) 783-0070
(By Federal Express)

Louis R. Cohen, Esq.
C. Boyden Gray, Esq.
Wilmer, Cutler & Pickering
2445 M Street, N.W.
Washington, D.C. 20037-1420
Fax: (202) 663-6363
Tel: (202) 663-6000
(By Federal Express)

Robert H. Bork, Esq.
1150 17th Street, N.W.
Washington, D.C. 20036
Fax: (202) 862-5899
Tel: (202) 862-5851
(By Federal Express)

Ms. Laura Bennett Peterson
700 New Hampshire Avenue, N.W.
Washington, D.C. 20037
Fax: (202) 298-8788
Tel: (202) 298-5608
(By Federal Express)

Mr. Carl Lundgren
Valmarpro Antitrust
5035 South 25th Street
Arlington, Virginia 22206-1057
Fax: (703) 235-5551
Tel: (703) 235-1910
(By Federal Express)

Lee A. Hollaar
School of Computing
University of Utah
3190 Merrill Engineering Building
50 South Central Campus Drive
Salt Lake City, Utah 84112-9205
Fax: (801) 581-5843
Tel: (801) 581-3203
(By Federal Express)

Robert S. Getman, Esq.
359 West 29th Street
Suite G
New York, New York 10001
Fax: (212) 594-6732
Tel: (212) 594-6721
(By Federal Express)

David R. Burton, Esq.
333 N. Fairfax St., Suite 302
Alexandria, VA 22314
703-548-5868